No. 91-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LIZZIE BEATRICE EASTERWOOD,
Petitioner,
v.
CSX TRANSPORTATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

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February 27, 1992

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QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to consider a cross-petition for certiorari filed more than ninety days after the entry of judgment when the original cross-petition was rejected for non-compliance with Supreme Court Rule 12.3?

II. Whether the Eleventh Circuit correctly held that the Federal Railroad Safety Act bars state tort law regulation of train speed when preemptive federal regulations govern this area of rail safety?

LIST OF PARTIES

Parties

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Lizzie Beatrice Easterwood

Parent Corporations

CSX Corporation

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RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests this Court to deny the Cross-Petition to review that portion of the Eleventh Circuit's decision, entered on June 20, 1991, correctly holding that Petitioner's "negligent train speed" claim was expressly preempted by the Federal Railroad Safety Act. CSXT petitioned this Court for review of the panel's preemption decision in the same case with regard to the railroad's lack of responsibility for selecting traffic-control devices at grade crossings. *See CSX Transp. Inc. v. Easterwood*, No. 91-791 (filed November 15, 1991).

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals is reported at 933 F.2d 1548. The Opinion of the United States District Court for the Northern District of Georgia is reported at 742 F. Supp. 676. Both opinions are reprinted in the Appendix to CSXT's Petition in Case No. 91-790.

JURISDICTION

Contrary to Petitioner's assertion, this Cross-Petition was not filed within thirty (30) days after CSXT filed its Petition in Case No. 91-790 on November 15, 1991. The Clerk of this Court rejected and returned an improper pleading submitted by Petitioner on December 16, 1991. Because Petitioner did not move for an extension of time to file this untimely Cross-Petition, this Court does not have jurisdiction to entertain the writ under 28 U.S.C. §1254 and the requirements stated in 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2:

> This Constitution, and the Laws of the United States...shall be the supreme Law of the Land;

Section 202 of the Federal Railroad Safety Act, 45 U.S.C. § 431, provides:

> The Secretary of Transportation...shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety....

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in- force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement....

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, CSXT takes issue with Petitioner's statement of the case and facts.

A. *Procedural Background.*

The issue presented arises from a grade crossing accident which occurred when Petitioner's husband drove into the path of CSXT's train at a grade crossing in Cartersville, Georgia. Petitioner invoked diversity of citizenship jurisdiction under 28 U.S.C. § 1332 and filed a wrongful death action against CSXT in the United States District Court for the Northern District of Georgia alleging, insofar as pertinent to the Cross-Petition, CSXT's negligence in exceeding a "reasonable" rate of train speed. (Complaint, R3-24).

CSXT moved for summary judgment on the entire case or, alternatively, for partial summary judgment on the negligence claim described above. The District Court granted CSXT's motion in its entirety and denied Respondent's request for rehearing. *Easterwood v. CSX Transp.*,

Inc., 742 F. Supp. 676 (N.D.Ga. 1990). In pertinent part, the District Court held that Section 205 of the Federal Railroad Safety Act (45 U.S.C. § 434) (hereinafter referenced as "Section 434") preempted Petitioner's "train speed" claim since (1) CSXT's train was travelling within federal train speed standards for the specific track in question, and (2) the express language, regulatory structure, and legislative history of the Federal Railroad Safety Act (hereinafter "FRSA") demonstrated Congress' intent to preempt state law control of any area of rail safety addressed in federal regulations issued by the Secretary of Transportation (hereinafter "the Secretary"). 742 F. Supp. at 677-78.

On June 20, 1991, a panel of the Eleventh Circuit affirmed in part and reversed in part the District Court's grant of summary judgment. The panel agreed that the FRSA expressly preempts tort claims relating to any rail safety subject matter addressed by federal regulations and affirmed judgment in favor of CSXT on Petitioner's train speed claim. *See Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1553 (11th Cir. 1991). Petitioner did not move for rehearing of this holding. On August 20, 1991, the Eleventh Circuit denied CSXT's Petition for Rehearing and Suggestion for Rehearing *En Banc* of the panel's further holding regarding FRSA preemption of state law claims concerning the selection of traffic-control devices at crossings. This latter holding is the subject of CSXT's Petition in Case 91-791, filed on November 15, 1991. Petitioner filed this untimely Cross-Petition on January 24, 1991, and CSXT's counsel received it on January 28, 1991.

B. ***Statement of Facts.***

CSXT disputes virtually every aspect of Petitioner's statement of facts. This factual narrative is devoid of

record citations and refers repeatedly to purported "evidence" submitted *after* the District Court ruled on CSXT's motion. The District Court refused to consider this untimely material offered without excuse, *Easterwood*, 742 F.Supp. at 677, and Petitioner did not appeal this aspect of the District Court's order.

Stated simply, this train-vehicle collision occurred at a crossing equipped with multiple passive and active warning devices which complied with federal grade crossing regulations governing this area of rail safety, including three separate sets of dual, automatic red-flasher lights. (R2-23). Petitioner's misleading factual narrative avoids these undisputed facts and instead refers to purported "facts" concerning the accident history, heavy use, and "numerous problems" associated with this crossing which are wholly beyond the record on appeal. CSXT therefore strongly objects to Petitioner's transparent effort to modify the appellate record with non-record aspersions irrelevant to the issue presented.

The question posed in the Cross-Petition implicates two undisputed facts of record which Petitioner understandably avoids. First, the railroad tracks at this crossing are designated "Class 4" tracks under federal regulations issued by the Secretary. Second, there is no dispute that CSXT's train was travelling at a speed well within the federal train speed standards established for this location.

SUMMARY OF ARGUMENT

This Court should decline to grant the Cross-Petition for three fundamental reasons. First, the Cross-Petition is untimely and should not be entertained by the Court.

Second, Petitioner concedes that there is no split of authority between the circuits on the specific issue posed in the Cross-Petition. Indeed, lower court decisions on this issue uniformly support the Eleventh Circuit's holding.

Third, the Eleventh Circuit's holding is well-supported. Under FRSA Section 434, states are not free to superimpose an *ad hoc, post hoc* system of regulating train speed through jury fact-finding since the Secretary has preemptively regulated the speed at which trains may travel at the location in question. Any other conclusion is at odds with the FRSA's explicit language, its legislative history, and uniform federal case law interpreting its provisions. Petitioner completely ignores the expressly preemptive effect of the Secretary's decision to regulate train speed and incorrectly urges an inapplicable implied preemption analysis. Finally, the Eleventh Circuit considered and correctly rejected Petitioner's claim that a jury's regulation of train speed falls within the "essentially local safety hazards" exception to express FRSA preemption.

REASONS FOR DENYING THE WRIT

I.
THIS COURT LACKS JURISDICTION SINCE THE CROSS-PETITION IS UNTIMELY

The Cross-Petition seeks review of a decision entered on June 20, 1991. Pursuant to 28 U.S.C. § 2101(c), the Cross-Petition was due in this Court no later than ninety (90) days thereafter since Petitioner did not move for rehearing. Alternatively, Supreme Court Rules 13.5 and 12.3 permit the filing of a cross-petition either (1) within ninety (90) days after entry of judgment, or (2) within thirty (30) days after receipt of the original petition in the

same case. Rule 12.3 also states that a cross-petition "cannot be joined with any other pleading, and the Clerk shall not accept any pleading so joined. The time for filing a cross-petition may not be extended."

On December 16, 1991 — the last day for filing a cross-petition under Rule 12.3 — Petitioner attempted to file a hybrid pleading which included both a response to CSXT's original petition and a cross-petition for certiorari. The Clerk refused to accept this improper document for filing and refunded the tendered filing fee. Petitioner thereafter filed this Cross-Petition on January 24, 1992 without requesting permission to file out-of-time or otherwise showing cause for this untimely filing as required in Rule 13.2. This Cross-Petition was therefore filed out-of-time and should not be considered by the Court.

II.
THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE RAISED IN THE CROSS-PETITION

The Cross-Petition carefully avoids any claim that the Eleventh Circuit's "train speed" preemption holding conflicts with even a single decision of any other federal court of appeals or state court of last resort. As such, the question framed in the cross-petition does not warrant this Court's discretionary review under Supreme Court Rule 10.

In an effort to create some semblance of conflict where none exists, Petitioner cites two lower court opinions that Petitioner alleges conflict with the Eleventh Circuit's holding on train speed preemption. (Cross-Petition at 10). Neither of the cited cases represents a conflict in the circuits and neither decision diminishes the overwhelming body of case law which supports the Eleventh Circuit's

holding of express FRSA preemption.[1] As demonstrated below, this issue has in fact generated a significant body of case law consistent with the Eleventh Circuit's interpretation. Moreover, it is undisputed that the Eleventh Circuit is the first court of appeals to rule on the issue raised in the Cross-Petition. In sum, there is no significant split of authority on this issue and no compelling reason for this Court's exercise of discretionary review.

III.

THE DECISION BELOW IS WELL-SUPPORTED SINCE THE FRSA'S LANGUAGE, LEGISLATIVE HISTORY, AND INTERPRETIVE CASE LAW MANDATE EXPRESS PREEMPTION OF PETITIONER'S TRAIN SPEED CLAIM

As the Eleventh Circuit correctly held, the FRSA reflects an explicit congressional intent to preempt state regulation of any rail safety subject matter addressed in federal rail safety regulations issued by the Secretary. Congress' intent is established in the language of the FRSA, by its purpose as expressed in legislative history, and in case law interpreting its provisions. Each of these

[1] Ironically, one case cited by Petitioner is actually consistent with the holding in issue. In *Florida East Coast Ry. v. Griffin*, 566 So.2d 1321 (Fla. Dist. Ct. App. 1990), the Court agreed that "the [FRSA] preempted a claim that a train, proceeding within the federal limit, was traveling too fast." *Id.* at 1324. This holding preceded the language cited by Petitioner on page 10 of the Cross-Petition. The language quoted by Petitioner refers to a railroad's duty to brake a train when confronted with children crossing the tracks in front of the locomotive. The *Griffin* case does not conflict with the holding herein that the FRSA expressly preempts a state law claim that a train travelling within federal train speed standards is nevertheless proceeding at a "negligent" rate of speed.

sources of authority confirm the propriety of the holding under review.

First, Congress expressly defined the broadly preemptive intent of the Act by charging the Secretary to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for *all areas of railroad safety*...." 45 U.S.C. § 431(a) (emphasis added). Congress " 'define[d] explicitly' " the FRSA's preemptive scope with respect to rail safety regulation and expressed within its terms an intent to preempt continuing state control of any aspect of rail safety regulated by the Secretary. *Armijo v. Atchison, Topeka of Santa Fe Ry Co.*, 754 F. Supp. 1526, 1530 (D.N.M. 1990) (quoting *English v. General Elec. Co.*, 110 S.Ct. 2270, 2275 (1990)). Specifically, Congress declared in Section 434 that rail safety regulation should be nationally uniform and that state regulation should be proscribed:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be *nationally uniform* to the extent practicable. A *State may adopt or continue in force any law*, rule, regulation, order, *or standard* relating to railroad safety *until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement*. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added).

Second, the FRSA's legislative history demonstrates that "[t]he issue of federal preemption was vigorously debated, leaving a clear record of Congressional intent for virtually complete federal preemption in the area of railroad safety laws." *CSX Transp., Inc. v. Public Utils. Comm'n*, 701 F. Supp. 608, 613 (S.D. Ohio 1988), *aff'd*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 781 (1991) ("*P.U.C.O.*"). Preemption was the "turning point" or central feature of the FRSA. *Hearings Before the House Subcommittee on Transportation and Aeronautics*, 91st Cong., 2d Sess. 43, 114 (1970) (remarks of Reps. Springer and Kuykendall). Congress determined that the former system of dual federal-state regulation inadequately promoted safety, *see* H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109, 4117, and recognized the need for a uniform body of regulation applicable to a national transportation system:

> [T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a *uniform body of regulation* and enforcement.... *To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.*

Id. at 4110-11 (emphasis added).

As the Eleventh Circuit correctly acknowledged, the FRSA's legislative history plainly demonstrates Congress' intent to eliminate state statutory and common law regu-

lation of any rail safety subject addressed in federal regulations:

> The legislative history indicates that Congress was wary of the role of the states in rail safety. The House Report stated that "[t]he committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems," or that railroads should "be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government." H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4109,. The committee also noted that "where the federal government has authority with respect to rail safety, it *preempts the field*." House Report at 4108 (emphasis added).

Easterwood, 933 F.2d at 1552.

Finally, numerous decisions have acknowledged the FRSA's expressly preemptive effect. The Third and Fourth Circuits have stated that Section 434 evinces a *"total preemptive intent"* by Congress over all areas of rail safety addressed by federal regulation. *National Ass'n of Regulatory Utils. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied*, 110 S.Ct. 213 (1989). *See also Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir), *cert. denied*, 414 U.S. 855 (1973) ("[FRSA] regulatory scheme has

pre-empted the field of railroad safety").[2] As the Eleventh Circuit correctly held, Congress "explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations." *Easterwood*, 933 F.2d at 1553.

As the Eleventh Circuit and the District Court also properly concluded, the FRSA specifically addresses and controls the speed at which trains may operate by classifying sections of track and regulating the speed on each section of track pursuant to 49 C.F.R. § 213.9. *See* 742 F. Supp. at 678; 933 F.2d at 1553. This federal train speed standard is only one of a broad array of federal train speed and train movement regulations issued by the Secretary under preemptive FRSA authority. *See* 49 C.F.R. §§ 201.4, 210.9, 213.4, 213.57, 213.137, 213 App. A, 215.9, 218.37, 218.79, 219.301, 229.117, and Part 236 (regulations on train speed, train movement, and train speed signals, etc.). It is undisputed that CSXT's train was travelling within the federal train speed standards applicable to this crossing. Consequently, since the Secretary regulated and established the speed at which CSXT's train could travel at this location, Petitioner's attempt to apply a different state law determination of appropriate train speed is expressly preempted. 45 U.S.C. § 434.

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[2] The following decisions state that Section 434 is "broadly preemptive," "totally" preemptive, or an "explicit preemption provision": *Norfolk & W. Ry. v. Public Utils. Comm'n*, 926 F.2d 567, 570 (6th Cir. 1991); *CSX Transp., Inc. v. City of Thorsby, Ala.*, 741 F. Supp. 889 (M.D. Ala. 1990); *P.U.C.O.*, 701 F. Supp. at 612-13; *Missouri Pac. R.R. v. Railroad Comm'n*, 671 F. Supp. 466, 471 (W.D. Tex 1987), *aff'd* 850 F.2d 264 (5th Cir. 1988), *cert. denied*. 488 U.S. 1009 (1989); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1236 (N.D. Ind. 1987).

This straightforward interpretation of the FRSA's expressly preemptive language is supported by an unbroken line of federal decisions which hold that local determinations of appropriate train speed, by municipal ordinance *or* jury verdict, are expressly preempted. *See, e.g., Mahony v. CSX Transp., Inc.*, No. 4:88-CV-13-HLM (N.D. Ga. Feb. 6, 1990); *Johnson v. Southern Ry.*, 654 F. Supp. 121, 123 (W.D.N.C. 1987); *Sisk v. National R.R. Passenger Corp.*, 647 F.Supp. 861, 865 (D.Kan. 1986); *Fogle v. CSX Ry.*, Nos. 90-CP-38-535 and 536 (S.C. 1st Jud. Cir., Aug. 14, 1991); *Santini v. Consolidated Rail Corp.*, 505 N.E.2d 832, 838 n.4 (Ind. Ct. App. 1987). The Georgia Court of Appeals recently agreed with the Eleventh Circuit and held that a "negligent train speed" claim under Georgia law is expressly preempted. *Central of Ga. R.R. v. Markert*, 200 Ga.App. 851, 410 S.E.2d 437 (1991). The *Markert* Court specifically held that "a state jury would not be authorized to find that a speed which was less than that authorized by the federal regulations was not a moderate and safe rate of speed." *Id.* at 852, 410 S.E. 2d at 437. Contrary to Petitioner's suggestion (Cross-Petition, at 5-7), the above-cited cases hold that *both* local train speed ordinances *and* tort law claims on train speed are preempted by the FRSA.

The underlying rationale for finding FRSA preemption of "negligent train speed" claims derives from uniform federal case law holding that the Secretary's choice to regulate train speed through 49 C.F.R. § 213.9 and other regulations completely preempts all local determinations of reasonable train speed. *CSX Transp., Inc. v. Thorsby, Ala.*, 741 F. Supp. 889, 891 (M.D. Ala. 1990); *Grand Trunk W.R.R. v. Town of Merrillville*, 738 F. Supp. 1205, 1207 (N.D. Ind. 1989); *City of Covington v. Chesapeake & Ohio Ry Co.*, 708 F.Supp. 806, 808 (E.D. Ky 1989); *CSX*

Transp., Inc. v. City of Tullahoma, 705 F. Supp. 385, 387 (E.D. Tenn. 1988); *Southern Pac. Trans. Co. v. Town of Baldwin*, 685 F. Supp. 601, 603 (W.D. La. 1987); *Chesapeake & O. Ry. v. City of Bridgman*, 669 F. Supp. 823, 826 (W.D. Mich. 1987); *Johnson*, 654 F. Supp. at 123; *Sisk*, 647 F. Supp. at 865. These courts, like the District Court and the Eleventh Circuit, properly found that local or common law control of train speed *"cannot coexist"* with federal train speed standards. *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1236 (N.D. Ind. 1987) (emphasis added). All of these decisions recognize the explicit language of Section 434 and the manifest congressional intent to promote rail safety through a vigorous regulatory scheme which is preemptive of non-uniform determinations of "appropriate" train speed by local municipalities and juries. As one court observed, a multitude of different local regulations or jury verdicts ostensibly designed to reduce hazards "do not, in the larger picture, reduce hazards at all, but rather may create them." *Covington*, 708 F.Supp. at 808.

Rather than meet the thrust of this massive body of authority, Petitioner presents a hodgepodge of tangential arguments. First, Petitioner erroneously relies on *implied* preemption cases that articulate a "frustration of purpose" or "conflict" standard applicable only when Congress has not defined the preemptive scope of the federal statutes or regulations at issue. (*See* Cross-Petition at 5-7). All of Petitioner's cited authorities are inapposite when, as here, Congress "define[d] explicitly" in FRSA Section 434 the preemptive scope of regulations issued by the Secretary in any area of "rail safety." *Armijo*, 754 F. Supp. at 1530. Once the Secretary regulated the subject matter of train speed, Section 434 bars state law control of the same subject

matter. Since Petitioner's claims are *expressly* preempted under Section 434, the question of whether state regulation of train speed is "consistent with" federal standards is irrelevant. The FRSA preempts even consistent, supplemental state or local regulations relating to rail safety. *Donelon*, 474 F.2d at 1112; *Armijo*, 754 Supp. at 1532; *Sisk*, 647 F. Supp. at 865. *See generally Pacific Gas and Elec. Co. v. State Energy Res. Consev. and Dev. Comm'n*, 461 U.S. 190, 203-204 (1983) (express preemption applies even to consistent state law).

Second, Petitioner's contention that state common law is somehow immune to preemption is likewise without merit. As this Court has repeatedly held, preemption applies regardless of whether the state law in question takes the form of a statute, an ordinance, a facet of the state's common law, or an individual award of state tort law damages. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). *See Easterwood*, 933 F.2d at 1552 n. 2. *See also* 45 U.S.C. §434 (explicit reference to preemption of state "laws" or "standards"). This Court has not singled out state tort law for special immunity to preemption. On the contrary, *Garmon* and its progeny hold that federal law preempts "tort law" to the same extent as any other type of state law.[3] Petitioner's implicit suggestion that

---

[3] Petitioner's reference to *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) is unavailing. The majority in *Silkwood* (1) acknowledged that Congress expressly preempted the field of nuclear regulation, (2) noted the "tension between the conclusion that nuclear safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability," but (3) found that Congress, through amendments to the Price-Anderson Act, expressly intended to "tolerate whatever tension" consequently resulted. *Silkwood*, 464 U.S. at 256. The *Silkwood* majority reiterated the *Garmon* rule and held that while state tort law is generally preempted to the same extent as any other form of state regulation, Congress may, if it chooses, preserve state tort law. Unlike the Price-

Congress must express its intent to preempt *specific types* of state law is not supported by case law or logic.[4]

Finally, Petitioner asserts that the Eleventh Circuit "failed to address" or "ignored" the "local safety hazards" exception to express preemption under Section 434. (Cross-Petition at 8-9). Petitioner is incorrect. The Court considered and correctly rejected this unsupported contention:

> Congress also passed a second savings clause permitting states to adopt more stringent state rules in order to eliminate a local safety hazard as long as the state rule is not incompatible with federal standards and the state rule does not create a "undue burden on interstate commerce." 45 U.S.C.A. §434 (1986). *This savings clause is irrelevant to the case at hand because a state does not legislate a general duty of care in order to eliminate a local safety hazard.* The legislative history makes it abundantly clear that this savings clause is to be narrowly construed. The House Report states:

Anderson Act, the FRSA contains no provision excluding state tort law from Section 434's express preemption. To the contrary, Congress expressly rejected a dual system of federal-state control over railroad safety and sought instead to promote rail safety through nationally uniform regulation.

[4] In contrast, Congress has on occasion explicitly *exempted* state tort law in otherwise preemptive federal statutes. *See, e.g.*, 15 U.S.C. §1397(k) (1990 Supp.) (preserving common law claims despite otherwise preempting state regulation of motor vehicle safety standards in §1392(d)); 49 U.S.C. §1506 (1976) (explicitly preserving common law claims under Federal Aviation Act).

* * *

> The States will retain authority to regulate individual local problems where necessary to eliminate or reduce essentially local railroad safety hazards. Since these local hazards would not be Statewide in character, *there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.*
>
> House Report at 4117. We therefore find this savings clause inapplicable to the case at hand.

Easterwood, 933 F.2d at 1553 n.3 (emphasis added).

Simply put, "there is no authority for the proposition that the State may delegate to its cities and towns [or common law juries] powers it is authorized by Congress to exercise." *Johnson*, 654 F. Supp. at 122. Indeed, federal courts have uniformly rejected this "delegation theory" in light of FRSA Section 434. *See, e.g., Consolidated Rail Corp.*, 664 F. Supp. at 1237 ("Section 434 and its legislative history speak only in terms of regulations ... or legislation" by *states*, not lesser political entities or juries) (collecting cases); *City of Bridgman*, 669 F. Supp. at 826 ("only a *state* may adopt a more stringent railway safety law in response to a local hazard"); *Sisk*, 647 F. Supp. at 865 (same). *See also Donelon*, 474 F.2d at 1112 (state court lawsuit does not fall within one of the permissible exceptions to Section 434 preemption).

Even if, contrary to the above-cited authority, state tort suits otherwise qualified as a permissable form of state regulation under the "local safety hazards" exception, Section 434 states that all non-federal rail safety measures must be "consistent with" the federal regulatory scheme and must not impose an "undue burden" on interstate

commerce. 45 U.S.C. § 434. The paramount federal interest in this nation's interstate railroad system, and the pervasiveness of the federal regulatory scheme covering "all aspects of rail safety", including train speed, are beyond dispute. The state tort law imposition of a maximum train speed more stringent than the federal standard is antithetical to these interests, Congress' goals in enacting the FRSA, and the federal regulatory scheme created by the Secretary.

Petitioner asserts that CSXT could comply with the federal standard *and* a lower, jury-imposed, train speed because a jury can still find a defendant negligent even when the defendant's conduct complies with legal requirements. This conventionalism completely begs the question of whether the imposition of *de facto* train speed limits by lay juries throughout the nation is consistent with Congress' objective of promoting rail safety through uniform, predictable, and rational rail policy based on expertise, not post-accident hindsight in the context of a jury trial. Petitioner's facile and unsupported interpretation of the "local safety hazard" exception runs completely contrary to Congress' manifest concern in the FRSA over parochialism, lack of expertise, and *ad hoc* regulation. Section 434 was *not* give cities and juries the authority to determine national railroad policy. Congress instead intended to call upon the expertise of state regulatory agencies, not municipalities or lay juries, for the regulation of true "local safety hazards." *See Consolidated Rail Corp.*, 664 F. Supp. at 1237.

Plainly, without preemption, "railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under §434, sought to avoid." *Rayner*, 873 F.2d at 66. *See Sisk* 647 F. Supp. at 865 (local determinations of reasonable train speed create "widely variant and

confusing" rail safety standards). Just as local speed ordinances destroy national uniformity and render meaningless federal determinations of reasonable speed, the imposition of state tort law adjudications of reasonable speed likewise frustrates Congress' objectives in this area of rail safety. Any other conclusion "is completely at odds with the language of Section 434, the structure of the FRSA as a whole, and congressional purpose in adopting the statute." *Consolidated Rail Corp.*, 664 F. Supp. at 1237.

The Eleventh Circuit properly and narrowly applied the FRSA and the Secretary's train speed regulations to preempt the state law claim regarding train speed. The Court's finding of express preemption is correct, supported by uniform authority, and offers no basis for further review.

CONCLUSION

For the foregoing reasons, CSXT respectfully requests this Court to deny the Cross-Petition.

This 27th day of February, 1992.

Respectfully submitted,

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